IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 311/2003

Shri Prakash Gopal Virginkar,
son of late Gopal Virginkar, aged about
49 years, married, Indian National,
Resident of House No.E-618,
Dr. Atmaram Borkar, Road,
Panaji, Goa. ..... Appellant.

V/s.

Smt. Umadevi Prakash Virginkar,
daughter of late Vencatexa Sinai Dempo,
married, aged about 48 years,
Indian National, resident of "Gangotri",
Altinho, Panaji, Goa. ..... Respondent.

Mr. S.D. Lotlikar, Sr. Advocate with Mr. M. S. Joshi, Advocate for the appellant.

Mr. M. S. Usgaonkar, Sr. Advocate with Ms. G. Kale, Advocate for the respondent.

CORAM : P.V. KAKADE, J.

Date of reserving the Judgment ;
25.08.2006.

Date of pronouncing the Judgment :
10th October, 2006.

ORAL JUDGMENT :

The unsuccessful plaintiff in Matrimonial Petition No. 51/2002

has come in this appeal against the Judgment and Order passed by the Civil Judge, Sr. Division, Panaji dismissing his petition for divorce under Article 4(5) and (8) of the Law of Divorce on the ground of abandonment of conjugal domicile and de facto separation freely consented for 10 consecutive 10 years.

2. I have heard the leaned Counsel for both the parties. Perused the record.

3. The facts giving rise to the dispute, in brief, are thus :

The parties were married at St. Cruz, Goa and it was registered in the Office of Sub-Registrar of Ilhas, at Panaji, Goa on 31.1.1982. The plaintiff and the defendant, after marriage, started residing in the conjugal domicile at Margao at the residential house of the plaintiff-husband until 1983. Thereafter, the plaintiff with the defendant stated residing at Ramnath Building at Altinho, Panaji, Goa and later at “Gangotri”, Altinho, Panaji till the year 1988. There were three children born out of the wedlock. It is the case sought to be made out by the appellant-plaintiff that on account of adamant nature of the defendant and her pride on account of riches, frequent quarrels started taking place between them. However, the plaintiff always tried to pacify the defendant and tried to settle the matter

ignoring the attitude of the defendant-wife. It is further alleged that prior to the separation, the defendant-wife on account of adamant attitude used to leave the matrimonial house as well as the places wherever they resided subsequently, and always to go to her parents' palace giving a warning to the plaintiff-husband that she wanted divorce from him and lived separately from the husband. Finally, on account of high handed behaviour of the defendant-wife, sometimes since August, 1988 the plaintiff and the defendant consented to stay separately and have been living separately from August, 1988 onwards till the date of the suit. According to the plaintiff, since then they have not seen each other till filing of the suit and the idea of separation originated from the defendant and she started picking up quarrels with the plaintiff saying that the status of the plaintiff was lower than that of the defendant and that if he wanted the defendant's company, the plaintiff would be required to dance to the tune and fancies of the defendant.

The plaintiff, after separation, sometimes in April, 1997 left for Kuwait on account of his job and is working in Kuwait since then and comes down to India and stays at different places. Hence, it is the case sought to be made out by the plaintiff that there is complete abandonment of conjugal domicile between the plaintiff and the defendant from the period from August, 1988 till the date of filing of the suit and there is a de

facto separation between the plaintiff and the defendant consented by the defendant from August, 1988 and hence the divorce is claimed under Article 4(5) and (8) of the Law of Divorce. Hence, the petition.

The defendant contested the claim denying the allegations made by the plaintiff. The sound of the defendant's defence is to the effect that the plaintiff was given a bad vices and inspite of the best efforts made by the defendant-wife to reconcile the differences, the plaintiff never responded and hence the grounds sought to be made out for divorce are false. The allegation that there is de facto separation with free consent is specifically denied by the defendant. On such and other grounds, the petition is sought to be dismissed with cots.

4. On the basis of the pleadings, the trial Judge settled the issues and on the basis of the evidence on record, came to the conclusion that the plaintiff failed to prove that there was complete abandonment of conjugal domicile by the defendant for more than 3 years. It was also held that the plaintiff failed to prove that the defendant freely consented for de fact separation between them for any period of time and ultimately, the petition came to be dismissed. Hence the present appeal.

5. At the outset, it may be noted that the alleged separation is

since the month of August, 1988 and the suit came to be filed on 10.12.2002. So, it is needless to mention that the evidence on record is sufficient to show that the plaintiff and the defendant are separated for more than 10 years. Perusal of the evidence on record also shows that there is no evidence to establish the element contemplated by Article 4(5) to the effect that there is complete abandonment of conjugal domicile for a period of not less than three years. It is settled position that the party who alleges complete abandonment of conjugal domicile has to prove that the other spouse has abandoned the conjugal domicile. Admittedly, the last conjugal domicile between the parties is at “Gangotri” Altinho, Panaji. The abandonment is an unilateral act of one of the spouses. The evidence further shows that the plaintiff has left the conjugal domicile and the defendant is still living at “Gangotri” which is the last conjugal domicile. The initial domicile at Margao is of no help to the plaintiff when the plaintiff himself has admitted that after August, 1983 they started residing at Panaji. It appears that by consent they made conjugal domicile at Panaji. Therefore, the spouse who has left the conjugal domicile and leaving separately cannot, in my view, claim divorce on the ground of complete abandonment. The findings recored by the trial Court on this issue appear to be correct.

6. Turning to the second aspect of the dispute contemplated by Article 4(8) of the Law of Divorce, it would be advantageous to quote the statutory provision, which is as follows :

> "De facto separation, freely consented, for ten consecutive years, whatever may have been the cause of that separation ".

That would be one of the grounds to seek and obtain divorce. The plaintiff has come with a case that the parties are de facto separated since August, 1988 till the suit was filed in the year 2002 i.e. more than 10 years. It is further alleged that the said de facto separation was by free consent. The element of alleged free consent is stoutly challenged by the defendant-wife. According to her, constant efforts were made by her to reconcile the disputes between the parties, for instance a meeting was arranged with one Pandurang Naik for reconciliation and letter was sent by the daughter Akshata to Kuwait where the plaintiff was serving, but he did not, admittedly, even open the letter to read its contents. Now the plaintiff has admitted both these aspects i.e. arranging meeting with Pandurang Naik with a view to reconcile the matter between the parties and the fact that the letter was sent to Kuwait where the plaintiff was serving by his daughter Akshata which was not even opened by him. Now it is submitted that the letter was part of process of efforts to reconcile the dispute between them,

but he did not even take trouble to open the same which, according to the defendant, was also the factual aspect to show that there was no free consent from her side for separate residence and de facto separation. It is true that the defendant has stated in her evidence that those were the feelers sent by her to the plaintiff in order to settle the differences, however, there is no evidence in support of such statements. However, these two aspects, viz. arrangement of the meeting with Pandurang Naik and sending of letter by the daughter Akshata to her father are sufficient indicators of the intention of the defendant which would show that there was no free consent on her part.

7. The learned Counsel for the appellant sought to put reliance on my un-reported Judgment dated 10th October, 2000 in First Appeal No.66/1997. This was sought to be relied upon for the purpose of putting emphasis on one observation relied upon by me in that case from the Commentary of Treatise on Civil Rights (Tratado de Direito Civil) by Dr. Cunha Gonsalves who has commented that to uphold the claim for divorce, it is enough to prove; (a) that the couple is de facto separated; (b) that this separation has been uninterrupted; and (c) that the said separation is for more than 10 years. It was also commented upon that the free consent is not issue to be proved, but it is a presumption that flows from the

proof of the above three facts. However, perusal of the said earlier Judgment would show that said certain comment of Dr. Cunha Gonsalves was relied upon in view of the totally different set of facts involved in that case. In that case, there was evidence to show that the respondent-wife had taken a decision on her own, on advice of a third party to remain separated from the husband i.e. from her marital home. This is not the factual situation involved in the present case. It must be noted that the basic principle of interpretation of a statute would require us to give a meaningful interpretation to each and every clause which is required to be established. In other words, in order to invoke the provision of Article 4 (8), it would be necessary to prove (i) that there is physical or de facto separation; (ii) that such separation was freely consented by the concerned party; (iii) that such separation was for more than 10 consecutive years; and lastly (iv) irrespective of the cause of such separation. In the present case before us what is wanting is the evidence to establish "**free consent**" by the defendant-wife. As we have seen earlier, the factual aspects of the evidence are sufficient to show that the plaintiff has failed to establish that there was free consent on the part of the defendant-wife and on the other hand, the evidence of the defendant-wife has established that she had made efforts during the said period of 10 years to reconcile the matter which would go to show that the separation for whatever reason was not by free

consent of the defendant.

8. Therefore, for the reasons recorded above, I hold that the learned trial Judge has rightly concluded that the plaintiff has not proved his case on this count also.

9. In the result, the appeal stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.